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No. 84-698

Supreme Court, U.S.
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IN THE SUPREME COURT

OF THE

UNITED STATES

JOSEPH M. SAIZAN,

Petitioner,

v.

RAYMOND DONOVAN, as Secretary of Labor of the United States of America, DONALD CARMEN, as Administrator of General Services Administration, ESRA POSTON, HERBERT ELLINGWOOD, and RONALD WERTHIM, as the Merit Systems Protection Board, CULLEN P. KEOUGH, DONALD H. WILLIAMS, and CHARLES H. SMITH, Respondents

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Petition for a Writ of Certiorari to the United Court of Appeals for the Fifth Circuit

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QUESTIONS PRESENTED

1. In a suit seeking relief from judgment, must defendant movants for summary judgment on the basis of the Rule 60(b)(3) time limit bar, establish by clear and convincing evidence (to the exclusion of any other reasonable inference), the fraud, misrepresentation, or other misconduct they rely on for their entitlement to summary judgment?

2. Do the same standards established in response to question #1 apply if defendant movants for summary judgment argue that a Rule 60(b)(3) time bar precludes petitioner's right to a trial to determine if relief from judgment is available under Rule 60(b)(6)?

3. Can fraud, misrepresentation, or other misconduct, preceeding the initiation of the complaint (and actually providing the basis for the complaint in which relief from judgment is sought) be used by movants for summary judgment in an action for relief of judgment to establish the subsection 3 time limit bar?

Stating the question differently: Must the

fraud, misrepresentation, or other misconduct relate to the procurement of the judgment from which relief is sought, as opposed to the substantive fraud alleged in the complaint, in which the judgment was rendered and from which relief is sought?

4) Is a summary judgment lawful in which the clear wording of both district court and appellate court establishes that each court placed on petitioner (the party opposing the motion) the burden of defeating the motion, rather than placing on defendant movants the burden of proving absence of any material issue of fact?

5) Is the proper standard for entitlement to summary judgment placing on petitioner, the opposing party, the burden of proving on trial of the motion that he could be successful in a trial on the merits, or is the proper standard determining if defendants movants, have established beyond any reasonable inference, that there are no issues of fact to be tried? Specifically, on a motion for summary judgment,

is the issue entitlement to relief under Rule 60(b)(6) or entitlement to a trial on the merits to determine entitlement to such relief?

6) Were defendants improperly granted summary judgment on petitioner's allegation of violation of the Freedom of Information Act when the sole basis for the summary judgment is that the information requested involved investigative files?

7) Is the discretion or power of a court involved when a motion for summary judgment is granted with something more than a "mere scintilla of evidence" of triable issues obvious from the the record?

8) Did the district court and the Fifth Circuit deprive petitioner of his constitutionally guaranteed right to a hearing and equal protection of the law by the summary judgment at issue herein?

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No. _____

IN THE SUPREME COURT OF THE

UNITED STATES

OCTOBER TERM, 1984

JOSEPH M. SAIZAN,

Petitioner,

v.

RAYMOND DONOVAN, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner, Joseph M. Saizan, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 13, 1984.

OPINION BELOW

The unreported opinion of the Court of Appeals is attached to this petition as Appendix A. The order of the Court of Appeals denying the petition for rehearing is unreported and is attached to this petition as Appendix B. The minute entry and judgment of the district court is attached as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was signed on June 13, 1984. The order of the Court of Appeals denying the petition for rehearing was entered on July 9, 1984.

This petition is timely filed within ninety days of July 9th, with the jurisdiction of this court invoked under Title 28, United States Code section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states in pertinent part that no person shall ". . . be deprived of life,liberty,

or property without due process of law; . . . ." The cases decided under this provision include thereunder the equivalent to the Fourteenth Amendment right to equal protection of the laws.

STATUTE INVOLVED

FRCP 56(c) provides that a summary judgment may be rendered if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.

FRCP 60(b)(5) provides for setting a judgment aside when it is no longer equitable that the judgment should have prospective application.

FRCP 60(b)(6) provides for a judgment being set aside for any other reason justifying relief for the operation of the judgment.

STATEMENT OF THE CASE

(a) The Parties

Petitioner Joseph M. Saizan (Saizan or petitioner) is an employee of Labor-Management

Services Administration, United States Department of Labor. Relief sought from defendant Department is solely reinstatement to the position deprived of, and back pay.

Defendants Keough, Williams, and Smith were petioner's supervisors. The lawsuit seeks to hold them personally liable for damages. This action was instituted prior to the decisions in Harlow v. Fitzgerald, 457 U.S. 800 (1982), and Bush v. Lucas, 103 S.Ct. 2404(1983).

Defendant Merit Systems Protection Board has the record of a hearing and its unissued decision on an appeal by petitioner of an adverse action.

Defendants General Services Administration has in its custody investigative files and other documents compiled by the Secretary of Labor which are essential to this case.

(b) Statement of Facts

On April 22, 1979, petitioner was demoted from his position of GS 13, step 6, supervisor to GS 12, step 1, non-supervisory investigator, and was simultaneously transferred to the St. Louis Area Office of the United States Department of Labor, where a position identical to that which was then available in the New Orleans Area Office, was also available. He had been employed in the New Orleans Area Office. Within applicable time limits, petitioner filed an appeal on the demotion with the Merit Systems Protection Board, and additionally, filed an EEO complaint alleging discrimination because of his age and reprisal for giving favorable testimony in an EEO investigationof a complaint of a female employee, who had alleged discrimination against the U. S. Department of Labor, resulting in a decision favorable to said employee. The transfer was not within the jurisdiction of the MSPB, but was subject to the mandated agency grievance procedures. When petitioner was not given the

hearing to which he was clearly entitled on the involuntary transfer, he filed CA 79-1684, in the Eastern Districe of Louisiana, petitioning the Court to exercise its supervisory jurisdiction. When it was established through civil service regulations that, even if the demotion had been proper, the degree of demotion was excessive. CA 79-1684 was amended to also invoke supervisory jurisdiction on the excessive demotion. Defendants Keough, Williams, and Smith, were sued personally in CA 79-1684 on the grounds that the adverse action had followed exercise of constitutional rights to petition a congressman, and petitioner invoked the agency grievance procedures. Responses to petitioner's interrogatories established that petitioner was the only supervisor in the prior ten years to receive a demotion based on performance. Petitioner has filed several formal grievances, all of which went unanswered, thereby establishing the animus toward such proceedings.

While defendant Keough had under considera-

tion a formal proposal by defendant Williams to remove petitioner from federal service, Williams, by letter dated December 28, 1978, written to Keough about other matters, included therein statements that established the high level of performance by the section supervised by petitioner. After the demotion, petitioner filed a freedom of information request for material from the New Orleans Area Office files that would establish this high level of achievement. When no information was furnished, existing complaints were amended to include the freedom of information violation.

Six months after initiating the EEO complaint, allegations pertinent thereto were included in CA 79-1684. The MSPB held a hearing on petitioner's appeal of the demotion during November and December of 1979. Before the decision of the MSPB was issued, petitioner entered into, in February, 1980, the settlement forming the basis for the consent decree at issue. The only meaningful consideration petitioner received was being raised to the level

of GS 12, step 10, and transferred at the government expense to the Dallas Area Office, both benefits of which he had already alleged entitlement to in CA 79-1684.

Petitioner filed CA 82-618, in February, 1982, petitioning the court to set aside the consent decree, so that petitioner could resume pursuit of the remedies truncated by the consent decree. The principal ground alleged in that action, and pertinent to this writ is that defendants used fraudulent means to endeavor to remove petitioner from federal service, resulting in the demotion and involuntary transfer. The precise statement is:

> "Defendants --- the Secretary of Labor, Keough, Williams. and Smith, --- committed numerous fraudulent acts designed to either remove Plaintiff from federal service or from the New Orleans Area Office where Plaintiff was employed, all of which had a material effect on Plaintiff's consenting to execute the document resulting in the dismissal of Civil Actions 79-1684 and 79-1685 with prejudice. Particulars of the fraudulent acts will be hereinafter provided. . . . did issue a performance evaluation to Plaintiff containing numerous false allegations of deficiencies and completely omitted the positive aspects of Plaintiff's performance. . . . effectively and fraudulently blocked Plaintiff's appeal

thereof." (From paragraphs VII & IX of the petition in CA 82-0618.)

Defendants' answers contained unequivocal denials of fraud or other type of wrongdoing.

Defendants' Motion for Summary Judgment

Defendants do not take issue therein with any of the allegations in petitioner's complaint. Defendants filed no affidavits nor documentary evidence of any kind, and they offer no explanation therefor. Defendants limited themselves to a "List of Undisputed Facts" and a "Statement of Facts" that are essentially a chronological listing or detailing of events and the dates on which they occurred, all of which clearly appear on the face of the record. No endeavor was made in the Motion to attach any significance to any of the details of the chronicle of events, except to show that more than one year elapsed between the date of the consent decree and the filing of CA 82-0618, seeking to have the consent decree set aside. Defendants predicate their plea for summary judgment on four narrow points: (A copy of the motion has been certified to this court.)

I.

Petitioner may not move for relief of judgment under Rule 60(b)(3) because more than one year elapsed from the date of the consent decree to the date CA 82-0618 was filed: "Neither may the plaintiff circumvent the time limits by filing a motion under Rule 60(b)(6), 'any other reasons justifying relief' since the courts have held that if coverage is provided by another provision then 60(b)(6) is not available."

Citations provided hereinafter clearly establish the well known principle of law that, he who attempts to use fraud as a basis for recovery or as a defense, has the burden of establishing fraud by clear and convincing evidence. The only factual issue addressed by defendants is to make a passing reference to petitioner's allegations referring to fraudulently withheld information. Additionally, defendants neither admitted withholding information nor pinpointing the irrelevancy of any withheld information to obtaining the consent decree. The most notable aspect of defendants'

argument on fraud is that no attempt is made to reconcile their denial of any kind of wrongdoing in their answers and their failure to file affidavits setting forth with the requisite particularity the details of their fraud. Obviously, until defendants admit fraud, therein lies an issue for trial on the merits to determine if defendants are entitled to a time bar. Defendants not only failed to counteract by affidavits the early denial of their own fraud, but failed to address from other matters of record, including petitioner's pleadings, where any fraud alleged or evidenced therein relates to Rule 60(b)(3). That rule is procedural, therefore, any substantive fraud contained in the petitioner's complaints in the suits dismissed as a result of the consent decree cannot, standing alone, inure to the benefit of defendants within the intendment of subsection (3) of Rule 60.

Petitioner in paragraph VII of CA 82-0618 specifically related the fraud alleged therein to his demotion and involuntary transfer, adding

"Particulars of the fraudulent act will be hereinafter provided." Defendants can offer no justification for their failure to address the issue that this clearly pertains to substance and not to procedural matters which alone are cognizable under Rule 60. Intent being an essential element of fraud, defendants were in the very best position to eleminate any doubt from petitioner's allegations pertaining to fraud, by providing the details that is peculairly within their knowledge and possession, in particular with regards to the degree that they intended to defraud. Furthermore, it is obvious that for the one year time limit to be invoked successfully as a bar to relief under subsection 6 of Rule 60, the fraud must be such that it would have been sufficient to satisfy the requirements for relief under subsection 3. Authorities, cited hereinafter at page 21, will establish defendants are burdened with proving the fraud which they allege, as providing a bar to relief under subsection 3. Relief under subsection 3 must have been possible, or the

petitioner at no time within the one year time limit would have had no justifiable reason for seeking relief under subsection 3.

Having failed to provide any clear and convincing evidence pertaining to their fraud, they seek to use this as a guise, and for this reason summary judgment must fail. When it does, there is then no further reason to consider any argument against Rule 60(b)(6) not being available to petitioner as a result of the subsection 3 one year time limit.

II.

They argue that petitioner may not move for relief under Rule 60 (b)(5) because "practically conclusive evidence" is required under that subsection. Defendants cited cases and facts from those cases but addressed no factual issues raised by petitioner in three civil actions at issue.

III.

They argue that prescription has extinguished all issues relating to facts pertaining to the individuals which occurred over one year

prior to February 18, 1982, the date of filing the instant suit. Nothing factual is offered relating to any of petitioner's allegations, or taken issue with. Reliance is again entirely on more than one year elapsing between the date of the consent decree and the institution of CA 82-0618. The source cited for this one year time limitation is the Louisiana Civil Code. Defendants offer nothing to contradict the suit having been filed within one yare of the occurences or that Federal Rule 60(b) time limitations apply rather than Louisiana law after entry of the consent decree.

IV.

Defendants argue that the freedom of information violation alleged is groundless because the information requested is subject to exceptions under the act. Defendants make it clear that the subject of the request was information contained in New Orleans Area Office investigative files. Reliance for authority in refusing to respond to the request is placed on the exceptions contained in 5 USC 552(b)(1)-(7)

and 29 CFR 70:21 through 29 CFR 70:28. Once more, nothing factually specific is addressed in defendant's motion. Defendants close their argument with "Saizan thus has not stated a claim since he has alleged no facts that support his allegation that the documents were wrongfully denied."

Defendants, in their motion, do not as much as try to make any kind of pretense at explaining how petitioner could supply such facts from records in defendants' exclusive control, when defendants on two separate occasions refused to provide any part of these records which are so crucial to the factual aspects of this case. Petitioner has aptly identified the irrelevancy of such denial of FOIA in his supplemental brief to the Fifth Circuit Court of Appeals:

> "Quoting from the second sentence, second paragraph, page 11, of their memorandum:
> 'The balance of the documents were denied to Saizan under 29 C.F.R. 70:21 through 29 C.F.R. 70:28, on the grounds that . . . (c) that they are investigatory records compiled for law enforcement purposes. These departmental records compiled for law enforcement purposes. These

departmental regulations correspond to exceptions created andauthorized by the FOIA itself. 5 U.S.C. 552(b)(1)-(7).'

The exception listed at 5 U.S.C. 552 (b)(7) pertains to investigatory files:

'. . . investigatory records compiled for law enforcement purposes, but only to the extent that the production of such records would (interfere with a lawful purpose) . . . . Any reasonably segregable portion of a record shall be provided to any person requesting such a record after deletion of the portions which are exempt.' (Emphasis supplied.)

Referring to the regulations quoted by defendants: '70.27. Exemption (7) is not absolute but conditional. Only under certain clearly defined conditions can refusal be made.' (Emphasis added.)

No one can be in a better position than defendants to show the existence of the 'clearly defined conditions' that justify refusal. Falling back on 'investigatory files' without as much as alleging other justification leases defendants' refusal to respond without merit. Appellant was sufficeintly acquainted with such obstructionist tactics so that almost immediately after filing Civil Action 82-0618, he procured an order enjoining the destruction of documents, a copy of which is attached immediately hereto."

Reasons for Granting the Writ

A litigant has the right to a trial where there is the slightest doubt as to the facts. Peckingham v. Ron Rico Corp. (1st Cir. 1948),

171 F.2d 653, 657. The burden of establishing the non-existence of any genuine issue of fact is upon the moving party and all doubts are resolved against him. On appeal, plaintiff must be given the benefit of every doubt. Walling v. Fairmont Creamery Co., (8th Cir. 1943) 139 F.2d 318, 322. The hearing on the motion for summary judgment is not to resolve factual issues, but solely to determine if there is any genuine issue of material fact in dispute. Bohn Aluminum & Brass Corp. v. Storm King Corp., (6th Cir.) 303 F.2d 425, 427.

If, upon the proofs adduced in support of a motion for summary judgment, any doubt remains as to the existence of a genuine issue of material fact, such doubt must be resolved against the movant for summary judgment and the motion for summary judgment must be denied. Moutoux v. Gulling Auto Electric, (7th Cir. 1961) 295 F.2d 573, 576.

The law is clear that one who moves for summary judgment has the burden of demonstrating that there is no genuine issue of fact. Fair-

banks, Morse & Co. v. Consolidated Fisheries Co. (3rd Cir. 1951) 190 F.2d 817, 824.

Upon a motion for a summary judgment it is no part of the court's function to decide issues of fact but solely to determine whether there is an issue of fact to be tried. Toebelman v. Missouri-Kansas Pipeline Co.(3rd Cir. 1942) 130 F.2d 1016, 1018.

Precisely the same reasoning has prevailed when the issue of burden in summary judgments has been considered by this court. In United States v. Diebold, Inc. 369 U.S. 654, 655 (1962), it was held that on summary judgment the inferences to be drawn from the underlying facts contained in such material must be viewed in the light most favorable to the party opposing the motion. It was held in Addickes v. S.H. Kress & Co. 398 U.S. 144(1970), that the moving party has the burden of showing the absence of a genuine issue as to any material fact, and for these purposes the material it lodged must be viewed in the light most favorable to the opposing party.

To obtain summary judgment, the movant must

demonstrate absence of any genuine issue of material fact after evidence submitted to court is viewed in light most favorable to the opposing party. In re Coordinated Pretrial Proceedings in Antibiotic Antitrust Actions (8th Cir.) 538 F.2d 180, cert. denied, 429 U.S. 1040 (1976).

The requirements for successfully establishing fraud also enter into consideration in applying the foregoing. Defendants seek to use fraud in obtaining the consent decree as a bar to petitioner's obtaining relief under any of the provisions of Rule 60(b) to which the one year time limitation does not apply. The law is clear on the standards that apply in establishing fraud and this has been the subject of a number of decisions by this court. Fraud is not presumed. Brashear v. West, 32 U.S. 608 (1833). Fraud is never to be presumed, but must be proved. Kempner v. Churchill, 75 U.S. 362 (1869). Fraud is not presumed, and the burden is upon the party alleging fraud to prove it. U.S. v. Arredondo 31 U.S. 691 (1832) Fraud is never presumed. U.S. v. Wunderlich,

342 U.S. 98 (1951).

Since defendants urge their own fraud as a bar to relief under subsection 6, they must meet the standards of specificity. This obviously places the burden of proof on those best able to carry it since defendants own acts are at issue, and the proof held securely in their possession. Defendants point to nothing specific in petitioner's complaint that allegedly spells out fraud within the intendment of subsection 3. Neither did the lower courts.

Decisions so numerous in both civil and criminal law as to eliminate the need for citation hold that there is imputed to the doer the intent to accomplish the end to which his action tends. One does not have to search far to establishaccording to those standards defendants' intent in the course of their arguments in support of their motion for summary judgment. Each argument tends to exclude facts from the court or to excuse defendants for their failure to produce documents and information peculiarly in their possession. This is most obvious in their refusal

on two occasions to produce any part of the investigative files material to the issues herein (and sought in FOIA requests by petitioner), particularly when consideration is given to the reason offered in support of their motion for summary judgment on that part of petitioner's complaint. That reason is, in itself, a flagrant violation of 5 U.S.C.552 and 29 CFR 70.21 ff. The ordinary rule, based on considerations of fairness does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary. Selma R. & D. R. Co. v. United States, 139 U.S. 560, 566 (1891); United States v. Denver R.G. Co., 191 U. S. 84, 91-92 (1903); United States v. N. Y., N.H. & Hartford R. R. Co. 78 S.Ct. 212, note 5 (1957). Defendants, movants for summary judgment, and thereby charged with the burden of proving their entitlement to summary judgment, argue entitlement to have the FOIA request summarily dismissed on the basis of petitioner's failure to produce evidence from files in their possession, which they refused on two occasions

to relinquish. According to well established rules of evidence cited 31A C.J.S. Evid. 113 the presumption is that this evidence would be detrimental to their defense and their motion for summary judgment.

Because of the burden placed on movants for summary judgment and the specificity requirements of establishing fraud, defendants must point to what on the face of the record establishes fraud relating to Rule 60(b)(3) to the exclusion of all other reasonable interpretations before it can serve the purpose assigned in the motion for summary judgment, namely, serving as a bar to relief under subsection 6. Furthermore, defendants are federal employees who under the doctrine of soverign immunity are entitled to every presumption that they acted in good faith in the discharge of their duties. It has been held that where the motive and design of an act may be traced to an honest and legitimate source equally as to a corrupt one, the former should be preferred. U.S. v. Arredondo, 31 U.S. 691 (1832). Taking this presump-

tion with their unspecified denial of wrongdoing unequivocally makes any allegation of fraud a trial issue of fact.

Again, no one is in a better position than defendants to know if they committed fraud. It has been repeatedly held that fraud must always principally depend on the Quo animo. Wiscart v. D.Auchy, 3 U.S. 321 (1796). Fraudulent intent is a necessary element in every actionable fraud. Russel v. Clarke's Ex'rs, 11 U.S. 69 (1812). Fraud consists in intention and that intention is a fact which ought to be averred. Moss v. Riddle & Co., 9 U.S. 351 (1809). The record shows defendants response to the filing of CA 82-0618 denies every allegation of wrongdoing of any kind. Defendants could have cured that defect, within the intendment of subsection 3, by filing affidavits setting forth the particulars of their fraud (including their intended fraud) in support of their motion for summarry judgment. The record establishes they did no such thing, thereby establishing at the present stage of the proceedings, a clear cut issue for trial on the merits.

Court Decisions

It is submitted that the district court and the Fifth Circuit Court of Appeal placed the burden proof on petitioner, rather than on movants, in deciding the motion for summary judgment. Quoting from page 10 of the Fifth Circuit's opinion: " . . . we do not feel that the district court abused its discretion in determining that Saizan has not shown such compelling or aggravating circumstances as to justify relief under this subsection." And in the penultimate sentence of the Fifth Circuit's opinion: "In this contenxt we cannot find that Saizan presented such unusual, exceptional circumstances as would justify upsetting the terms of the consent judgment to which he agreed." (Emphasis added.) This kind of reasoning places that decision in conflict with other circuits and this Court.

A court derives its power to render summary judgment from Rule 56, which states:"The judgment sought shall be rendered forthwith if . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a mater of law."

Other circuits consistently interpret this provision as placing the burden on the moving party to show the absence of an issue as to any material fact. (See above.)

Quoting from page seven of the Fifth Circuit's opinion: ". . . recognizing that motions under Rule 60(b) are directed to the sound discretion of the trial court and that the denial of relief under the rule will be set aside on appeal only for abuse of that discretion. Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 402 (5th Cir. 1981)." Petitioner respectfully submits the matter presented to the Fifth Circuit in this appeal was not "denial of relief under the Rule," but was rather a denial to petitioner of his Fifth Amendment right to be heard and equal protection of the laws. The clear wording of both opinions of the lower courts in this and other statements is that petitioner could not prevail on his allegations and this goes beyond the power of the courts in considering motions for summary judgment.

Quoting from page ten of the opinion:

"Moreover, Saizan presents no adequate explanation of his nearly two year delay in seeking relief." Defendants did not put at issue within the intendment of subsection 6 the unreasonableness of the time lapse between the consent decree and petitioning for relief, therefore, petitioner had no opportunity to respond. However, it is obvious that the Fifth Circuit would have exceeded it authority in deciding such a matter on a motion for summary judgment.

Quoting from page twelve of the opinion: "Saizan in no sense comes forward with the practically conclusive evidence on the basis of which relief was granted in Ferrell v. Trailmobile, Inc., 223 F.2d 697 (5th Cir. 1955), and Johnson Waste Materials v. Marshall, 611 F.2d 593 (5th Cir. 1980)."

Quoting from page thirteen of the opinion: "In this context we cannot find that Saizan has presented such unusual, exceptional, and egregious circumstances as would justify upsetting the terms of the consent judgment to which he agreed."

Such conclusions by the court could only be made after determining factual issues that not even defendants put at issue in their motion for summary judgment. It must again be pointed out that defendants filed no affidavits nor documentary evidence, and that the only argument on the facts with any specificity relates to the more than one year having elapsed between the consent decree and the initiation of proceedings to have it set aside, and petitioner's freedom of information request, which pertains to investigative files, neither of which had been put at issue in the motion.

The district court, while somewhat contradictory in its statement, in effect followed the same line of reasoning. Quoting from the district court's opinion: ". . . in view of the fact that plaintiff has failed, as far as I can see, to set out any valid contention regarding 'fraud, misrepresentation or other misconduct . . . .' By the same token, I find no reason to impose the provisions of Rule 60(b)(6)." (Emphasis added.)

By the plain wording of both decisions the burden of proving defendants' non-entitlement through summary judgment has obviously been placed on petitioner, with what is, in effect, trial on the merits of his complaint.

The power of the courts is severely limited in considering motions for summary judgment. It has been held that in deciding motions for summary judgment, it is not the function of the trial court ot determine any genuine factual issue. Rodrigquez v. Bd. of Ed. of Eastchester U. Free School (2nd Cir. 1980), 620 F.2d 362. A case is not suitable for summary judgment even though there are undisputed facts from which different inferences might be drawn and as to which reasonable minds might differ. Sankovich v. Life Ins. Co. of North America (9th Cir. 1981) 638 F.2d 136. In Re Atlas Concrete Pipe, Inc., (6th Cir. 1982) 668 F.2d 905, a district judge first viewed the demeanor of several witnesses before granting summary judgment. On appeal, the summary judgment was reversed because it had been necessary to weigh credibility, and where cred-

ibility must be weighed to decide a factual issue, summary judgment is inappropriate whether the case be a jury or a court trial.

Another matter for consideration is that defendants based their argument for the one year time limit bar on petitioner basing his claim for relief on fraudulently withheld information. Quoting from page four of their motion for summary judgment: "In the case at bar, there can obviously be no action for fraud upon the court since the allegations made by Saizan are similar to those in Williams, supra, namely fraudulently withheld information." This must be compared to the following statement in the Fifth Circuit's opinion: "Although he attempts to couch his argument in terms of his having been compelled to agree to the consent judgment out of duress, the duress of which he compalins is essentially nothing other than the various acts that formed the basis for his original lawsuits."

The opinion further reinforces that concept on page thirteen: "Further, the essence of what he now asserts as a basis to upset the consent

judgment was known to him at and before its entry, and indeed these complaints were in substance part of thosethat the consent judgment purported to settle and dispose of."

Whereas the Fifth Circuit may have well overstepped the bounds of its authority in reaching such a conclusion of fact on the appellate level, and, moreparticularly, in relation to a motion for summary judgment, if it is so obvious that petitioner was so well informed as to have known about the withheld information at the time of and before the consent decree. How can this withheld information possibly have provided a basis for relief under subsection 3? If not, then what is the materiality of the one year time limit since no relief could have been obtained under that subsection?

To have been deceived is a very necessary element in an action based on allegations of fraud. He who alleges fraud must establish the element of deceit. The Fifth Circuit opinion clearly rules out that petitioner was deceived.

The summary judgment appealed to the Fifth

Circuit included dismissal of petitioner's allegation of a Freedom of Information violation. The Fifth Circuit took notice of the pending allegation but failed to rule on that aspect of the appeal. There is no evidence in the opinionthat can serve to indicate the rationale of this failure to rule on this clear violation which is not interrelated to the consent decree. The opinion also mentions an allegation of a privacy act violation, disposing of it by finding that the district court failed to rule on the motion to supplement the complaint. It is petitioner's position that the allegation of the privacy act violation was included in the summary judgment and includes that in this application for writs. Insofar as defendants have offered no argument thereon, petitioner is without notice as to what address.

Rule 60(b)(6)

It is respectfully pointed out that petitioner's entitlement to relief under the provisions of subsection 6 is not the issue at this

level of the proceedings. The only thing at issue is petitioner's entitlement to a trial on the merits of his complaint, to determine if he is in fact entitled to relief under subsection 6, after completion of the trial.

Defendants took no issue with any of petitioner's allegations in their motion for summary judgment. Instead, they avoided the allegations by alleging a time bar. Defendants did address the issue of applicability of Rule 6 in their appeals brief, but they provided only a generalization that: ". . . petitioner submitted no facts to justify relief under Rule 60(b)(6)."

The Fifth Circuit found as a matter of fact that petitioner's justification for obtaining relief would have fallen within the provisions of Rule 60(b)(3) but petitioner, having failed to seek relief within the one year period, " . . . seeks to use subsection (6) merely as an escape from his failure to seek relief within one year. . . ."

Petitioner is, therefore, without notice as to where his complaint for relief from the con-

sent decree fails to state a cause of action. It is respectfully submitted if, at this time, petitioner offered no further argument, the summary judgment should be reversed. However, petitioner will point out a number of issues that must be disposed of prior to judgment, and he is having certified simultaneously with filing this application the court records establishing a number of these issues. These will include the pleadings, documents filed in support thereof, interrogatories and responses thereto.

Rule 60(b) is to liberally construed to do substantial justice, to balance the desirability of finality of judgments against providing relief from unjust judgments. Klapprott v. United States, 335 U.S. 601, 609(1949); Schwab v. Bullock's, Inc., 508 F.2d 353 (9th Cir. 1975); Tozer v. Charles A. Krause Milling Co., 189 F.2d 242, 245(3rd Cir. 1951).

For further clarification of how subsection 6 relates to the issues herein, it is only necessary to consider the principal cases cited by defendants in their motion and the Fifth

Circuit in its opinion to determine if the record in its present state identifies issues for trial. Defendants cite Ferrell v. Trailmobile, 223 F.2d 697 (5th Cir. 1955) and Johnson Waste Materials v. Marshall, 611 F.2d 953 (5th Cir. 1980), as authority for the evidentiary standards applicable for relief under subsection 5. Since subsection 5 and 6 both permit a reasonable time within which to petition relief, and both involve principles of equity, the citations from that standpoint refer as much to one as to the other. In both cases cited, the plaintiffs were successful in obtaining relief from judgments on facts sufficiently similar to this case as to make the controlling rule of law identical.

In both Ferrell and Johnson Waste, the plaintiffs produced evidence that they had in fact made installment payments for which they had been cast in judgment. In this case, defendants detailing of undisputed facts show petitioner had fulfilled each and every requirement for pursuing available remedies for relief from the demotion, the involuntary transfer, and even

gone so far as to challenge the degree of demotion to the Merit System Protection Board, if it should have turned out that the demotion ab initio was proper. Avenues of relief included an appeal to the MSPB, Equal Employment Opportunity procedures(subsequently filed in district court), Freedom of Information requests (also made part of existing court proceedings), and filing a copy of the regulations in the record, which indicated that, under any condition, the degree of demotion was improper, and which was an endeavor to pierce the penumbra of protection afforded defendants Keough, Williams, and Smith by the sovereign immunity enjoyed by these federal employees. Petitioner propounded interrogatories to defendants eliciting information that established the position to which petitioner was transferred in St. Louis existed in New Orleans at the time of transfer, with no difference of any kind.

Petitioner, at thatpoint, without having obtained the benefit of any of the due process of law procedures invoked, entered into a con-

sent decree, thereby truncating the effect of such invocation. The Fifth Circuit cites Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, as authority for denial of relief under the Rule, and that judgment will be set aside on appeal only for abuse of discretion. Whereas, the Fifth Circuit in deciding the Seven Elves case made mention of that point, it was made only in contrast to an entirely different principle of law. The holding in that case is that the finality of judgments must yield in appropriate cases to the equities involved so that the judgment might reflect the true merits of the cause:

> "(1-3) In this light it is often said that the rule (60(b)) should be construed in order to do substantial justice. E.g., Greater Baton Rouge Golf Ass'n v. Recreation & Park Comm'n, 507 F.2d 227, 228-29 (5th Cir. 1975) Leguna Royalty Co. v. Marsh 350 F.2d 817, 823 (5th Cir. 1965); In Re Casco Chem. Co., 335 F.2d 645, 651, n. 18 (5th Cir. 1964); Serio v. Badger Mutual Ins. Co., 266 F.2d 418, 421 (5th Cir.), cert. denied, 361 U.S. 832, 80 S.Ct. 81, 4 L.Ed. 2d 73 (1959). What is meant by this general statement is that, although the desideratum of finality is an important goal, the justice function of the court demands that it must yield, in appropriate circumstances, to the equities of the particular case in order that the judgment might reflect the true merits of the cause. See Bros., Inc. v. W. E. Grace

Mfg. Co., 320 F.2d 594, 610 (5th Cir. 1963); Serio v. Badger Mutual Ins. Co., 266 F.2d 418, at 421. This is not to say that final judgments should be lightly reopened. The desirability of order and predictability in the judicial process calls for the exercise of caution in such matters. See Fackelman v. Bell, 564 F.2d 734, 736 (5th Cir. 1977). But there can be little doubt that Rule 60 (b) vests in the district courts power 'adequate to enable them to vacate judgment whenever such action is appropriate to accomplish justice.' Klapprott v. United States, 335 U.S. 601, 614-15, 69 S.Ct. 384, 390, 93 L.Ed. 266 (1949); Menier v. United States, 405 F.2d 245, 248 (5th Cir. 1968); Bridoux v. Eastern Airlines, Inc., 214 F.2d 207, 210 (D.C. Cir. 1954).

(4-7) In sum, then rule 60(b) is a 'grand reservoir of equitable power to do justice in a particular case,' see Menier v. United States, 415 F.2d at 248, that may be tapped by the district court in the sound exercise of its discretion, and within the strictures inherent in the underlying objectives of the rule.

Our task on this appeal is to determine ... whether the district court's refusal to tap that reservior in the present case was so unwarranted as to justify reversal. We conclude that it was. . . .

(9, 10) Other equities as well would militate in favor of relief. There are no intervening rights that would be prejudiced by the granting of relief; no great delay is likely to occur; the amount of money involved is very great, itself militating in favor of a full trial on the merits; . . . . Balanced against these considerations is the desirability of preserving the principle of finality of judgments. That policy is, and should

> be, strong. But in the face of the unusual circumstances delineated above, we conclude that it must yield to the equities of the case in order that the appellants may be afforded their day in court."

It is again pointed out that the issue herein is even stronger than the rule in Seven Elves. Here the issue at this stage does not go beyond the right to be heard to determine if relief is proper under subsection 6.

Proceeding to the merits of petitioner's allegations, it is well established as a principle of law that when a party is peculiarly in possession of knowledge and evidence material to a lawsuit and fails to produce that knowledge or evidence that there is a presumption that the information is against him. Petitioner in paragrapn XX of CA 82-0618 alleges a matter obvious from documents certified to this court that he had settled for less than that to which he was already entitled.

Defendants Secretary of Labor, Keough, Williams, and Smith are in the best postition to refute that statement and the evidence petitioner has placed of record prior to entering

into a settlement with these defendants. This evidence includes a copy of the Civil Service regulations prescribing the levels to which an employee may be demoted; interrogatories filed in CA 79-1685 entitled INTERROGATORIES-2nd SET pertaining to the issue of demotion still remain unanswered. The consent decree shows petitioner was increased to the GS 12, step 1, level, effective with the date the consent decree was entered, rather than the date of the demotion, which was the proper date. Defendants are in the best position to refute that petitioner was entitled of right to have been demoted no lower than that level and that there is back pay owed him for about ten months for the difference between the pay for GS 12, step 1, and stept 10. The back pay issue is the basis for petitioner saying that he settled for less than he was entitled to. Defendants totally failed to address these issues.

In response to an interrogatory about the difference between positions in St. Louis for petitioner's job description and those in New

Orleans, defendants replied, "No such difference exists." As the complaints in 79-1685 & 79-1686 establish, the transfer was prohibited, avenues of redress provided for in Department of Labor published regulations were withheld from petitioner, and the involuntary transfer followed exercise of protected rights, including petitioning a congressman, filing formal grievances, and giving testimony favorable to a complainant in an EEO investigation of allegations of sex discrimination which was unfavorable to defendants. Additionally, petitioner identified, in paragraph XXI of Civil Action 79-1685 the existence of a letter from Williams to Keough written on other matters but in effect lauding the perforamce of the section petitioner supervised. The letter was written while Keough had under consideration William's proposal to remove petitioner from federal service for substandard performance, absolutely establishing the entire adverse treatment to be the result of animus. The rule laid down in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)

nd subsequent cases, shifts the burden to defen-
lants to disprove discriminatory treatment.
Since petitioner has alleged entitlement to more
han the value parted with by the defendants in
xchange for the consent decree, and defendants
ave not addressed that issue when they are pos-
essed of full information about petitioner's
ntitlement, the presumption is in petitioner's
avor. For purposes of deciding the motion for
ummary judgment it must be presumed that defen-
ants parted with nothing to which petitioner
as not already entitled. The Fifth Circuit
n its opinion in Strouse v. J. Kinson Cook,
nc., 634 F.2d 883 (5th Cir. 1981), cites as
uthority for construing a consent decree like
contract, but being, nevertheless, a judgment.
f that is the case, the consideration being a
equisite for a binding contract, any lack of
onsideration can, standing alone, meet the
for any other purposes" provision of subsection
.

However, as the Fifth Circuit so adequately
ointed out, if the contract on which the con-

sent decree is based is also to be treated like
a judgment, then the avenues of relief open to
petitioner under subsection 6 are broader than
contract law provides. Also, in matters involving litigation with the government, special considerations are involved, including the obligation to provide the individual with due process of law. A contract with the government in which rights are forfeited, or exchanged, for other rights, a corruption of all of the rights is worked: "A defendant is entitled to certain rights and protections which derive from a variety of sources. Defendant is entiled to all such rights and cannot be forced to barter one for the other. When exercise of one right is made contingent on forebearance of another, both rights are corrupted." U.S. ex rel Wilcox v. Johnson, 555 F.2d 115, 120 (3rd Cir. 1977) (Emphasis added by plaintiff.)

Defendants' motion refers to the decision by the Merit System Protection Board as having been unissued rather than not having been reached. The MSPB is represented by the same

counsel as the other defendants. On way of expediting the resolution of this case would have been to introduce that decision as a form of documentary evidence supporting the motion for summary judgment. Defendants, having failed to do so without explanation, are subject to the presumption that the decision would not have been favorable to their case.

Consideration must be given to the role of judicial notice in determining if any triable issues are discernable from the record. In West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399(1936), this court stated that it is unnecessary to cite official statitics to establish what is common knowledge throughout the length and breadth of the land. Judicial notice suffices. The court further observed that the exploitation of a class of workers who are in an unequal bargaining position with employers and thus relatively defenseless against the denial of a living wage, is, in addition to other adverse consequences, detrimental to their health and wellbeing.

This court also observed in Detroit Edison Co. v. N.L.R.B.,99 S.Ct. 1123, 1133 (1979), that the sensitivity of any human being to disclosure of information that may be taken to bear on his and her basic competence is sufficiently well known to be an appropriate subject of judicial notice. It is submitted that the factual situations outlined in 79-1684 & 79-1685 are certainly the proper subject of judicial notice. The threat to the means whereby petitioner derived his livelihood as outlined in defendants' LIST of UNDISPUTED FACTS, the challenge to his competence as a federal employee while at the same time exchanging correspondence lauding the performance of the section supervised by petitioner, withholding pertinent records when there was a clear legal obligation to disclose the records, place this case well within the ruling in these two cases. Such actions cannot take place without an adverse personal effect on the recipient, namely petitioner.

The court is at this time requested to take judicial notice of the Department of Labor being

the federal agency assigned to attend to the wellbeing of the American work force, and, as such, must be considered an authority competent to pass on the effects on employees of influences such as stress. The court is also requested to take judicial notice of the role assigned the National Aeronautics and Space Administration in such matters as national defense and administration of this country's space program, and that it too, through the work of its occupational medicine program, must be considered an authority on such matters as stress. This court is further requested to take judicial notice of the well known fact that stress is harmful to the point of causing heart attacks and hypertension, with the possibility of strokes resulting therefrom. In its effects, stress potentially has the effect of a lethal weapon.

Among the records certified to this court is a document entitled MANAGING STRESS which was simultaneously filed in the pleadings of CA 82-0618, in support of the cause of action outlined therein. That document shows its date

to July, 1981, and that its distribution is to all Department of Labor employees. It further shows it source to be a reprint from the National Aeronautics and Space Administration, Occupational Medicine Program. Factors according to the document which can be predictive of illness include: uncertainty about job future, change in work assignment, friction with a supervisor, change in living conditions, legal problems, major change in financial status, inability to meet ongoing expenses, and others.

This exactly tracks facts readily discernable not only from pleadings in CA 82-0618, but also from defendants LIST OF UNDISPUTED FACTS. Included in the suggestions as to how to cope with stress are not to attempt to deal with your problems or symptoms through the use of chemicals, including sleeping medications and tranquilizers. Long term usage of such agents is described as harmful in itself ". . . and does not relieve the stress which brough on many of the symptoms. If job factors are creating stress, do something about them rather

than letting the situation drift on and on."

Petitioner's response to interrogatories propounded by defendants, also certified to the court, show that during the time of the demotion and transfer, petitioner required treatment by a psychiatrist who prescribed limbitrol, a powerful tranquilizer. The consent decree also shows petitioner's endeavor to prevent the situation in which petitioner was thrust by defendants from drifting "on and on."

Paragraph XVI of CA 82-0618 shows that members of petitioner's family also had health problems, all of which heightened petitioner's susceptibility to the stress situation imposed by defendants.

Petitioner alleges in Paragraph XVII that one of the forms of duress to which petitioner was subjected, standing alone, has been recognized by the medical profession as being the leading cause of illness requiring psychiatric treatment. In paragraph XX, petitioner alleges he will establish through expert testimony that the various elements of the adverse treatment

dealt petitioner by defendants is synergistic.

Obviously, the first question to present itself is: Did the defendants motion for summary judgment place petitioner in a position requiring him to come forward at that point with expert testimony? Apart from movants for summary judgment having the burden of ruling out all possibilities of significant issues, what notice did petitioner have of what defendants challenged? Whatever was challenged should have clearly appeared from their motion. The courts have so often held in both criminal and civil proceedings that intent is determined by the ends to which our actions tend that citation is unnecessary. From that point of view, it becomes obvious why defendants have attempted an end run around factual issues relating to subsection 6 of Rule 60(b), by alleging a time bar that contradicts their own denial of wrongdoing and uses a violation of theri own regulations to try to justify withholding material evidence contained in their own investigative files. The obvious end of such actions is to

keep this evidence from the court and the legal result of such an end is a presumption that the evidence will be solidly against defendants. Defendants, to be entitled to serious consideration in their bid for summary judgment, at a minimum, must come forward with all of the evidence in their possession and show it is in their favor to the extent that reasonable minds could not differ in inferences they draw from the evidence. Any other standard deprives petitioner of his fifth amendment right to a hearing and equal protection of the law.

Proceeding further, it is only necessary to review the other provisions of Rule 60(b) to determine the legislative intent as to the situations to receive considerations under subsection 6. For example, provisions are made to give relief from judgment even after trial on the merits for mistakes, inadvertance, and excusable neglect. This is obviously to permit the final outcome of litigation to reflect the merits of the case so that the ends of justice might thereby be served. Petitioner, rather

than having committed any mistake, inadvertent or neglectful act, pursued each and every avenue of appeal until a point was reached where he had to make a hard decision of releasing the opportunity to have his appeals decided on their merits. This was not the result of mistake, inadvertence, or neglect of any kind, nor have defendants made any such allegation. No evidence has been introduced that this was a frivolous choice or a choice that a reasonable person would not have made under the same circumstances. If a plaintiff can have a judgment set aside after trial on the merits for mistake, inadvertence, or excusable neglect, effecting the outcome of the trial, then can subsection 6 be interpreted so narrowly as to deny petitioner herein his constitutionality guaranteed day in court? This is absolutely all petitioner asked for in filing CA 82-0618.

It is submitted that petitioner stands in the same position as the individual litigants in Klapprott v. United States, 335 U.S. 601 (1949), and United States v. Karahalias, 205

F.2d 331 (2nd Cir. 1953), with an important exception. Both were granted trials on the basis of hardship to determine entitlement to relief from judgments. The United States government made no contribution in either case to the hardship situation alleged. In this case, defendants in a LIST OF UNDISPUTED FACTS, establish a direct relationship between petitioner's plight and the government's actions preceeding initiation of the civil actions truncated by the consent decree.

Petitioner realizes the special considerations to which defendants Keough, Williams, and Smith are entitled by virtue of their employment by the United States government. However, the record as it now stands leaves them in exactly the same position considered in Harlow v. Fitzgerald, 457 U.S. 800 (1982). The requirements set forth therein for sovereign immunity to attach to their acts at issue therein have not been met by their motion for summary judgment. It is submitted that until such a showing as contemplated in the Harlow

case is made, they are properly party defendants.

CONCLUSION

Defendants, who submitted no documentary evidence or affidavits in support of their motion for summary judgment, endeavored to finesse their way around the issue of petitioner's being entitled to a trial to determine the availability of relief under the provisions of Rule 60(b)(6), by alleging a time bar under subsection 3. Their argument thereon lacked both specificity and the clear and convincing evidence required to establish the absence of any material issue of fact. They did not otherwise address the availability of relief to petitioner under subsection 6 until they filed their appellate brief responding to petitioner's appeal from the summary judgment. Then, they went no further than to refer in general terms to the difficulty in establishing entitlement to such relief.

The District Court and the Fifth Circuit Court, in considering defendant's motion for summary judgment, in effect, first placed the burden on petitioner to show he would prevail

in a trial on the merits, then found he could not prevail. This is contrary to the laws in other jurisdictions and in the United States Supreme Court. In all these jurisdictions, the applicable standards place the burden on movant to show absence of triable issues and it is reversible error to take into consideration the potential outcome of trial on the merits.

This leads to the inevitable conclusion that the summary judgment deprived petitioner of his constitutionally guaranteed right to a hearing on the merits of his complaint and to equal protection of the laws. The petition for writ of certiorari should be granted.

Dated: October 5, 1984

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Attorney for Plaintiff